

## APPEAL NO. 010551

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 13, 2001. With respect to the issues before her, the hearing officer made the following determinations: that the respondent/cross-appellant (claimant) sustained a compensable injury to his right shoulder on \_\_\_\_\_; that the \_\_\_\_\_, compensable injury did not extend to and include the right shoulder; that the claimant reached maximum medical improvement (MMI) relating to the \_\_\_\_\_, compensable injury on June 24, 1998, with a 3% impairment rating (IR); that the appellant/cross-respondent (carrier) did not waive its right to dispute the IR for the \_\_\_\_\_, injury; and that the claimant was not entitled to supplemental income benefits (SIBs) for the third quarter. In its contingent appeal, the carrier contends that the hearing officer erred in determining that the claimant sustained a compensable injury to his right shoulder on \_\_\_\_\_. In his appeal the claimant asserts error in the hearing officer's determinations that the \_\_\_\_\_, injury did not extend to and include the right shoulder; that the claimant reached MMI on June 24, 1998, with a 3% IR for the \_\_\_\_\_, compensable injury; that the carrier did not waive the right to dispute the IR for the \_\_\_\_\_, injury; and that the claimant is not entitled to SIBs for the \_\_\_\_\_, compensable injury. In its response to the claimant's appeal, the carrier urges affirmance. The appeal file does not contain a response to the carrier's appeal from the claimant.

### DECISION

Affirmed.

The claimant testified that on \_\_\_\_\_, he was working for the employer as an electrician. He stated that as he was helping pull heavy wire into a blockhouse, he developed a burning pain in his right shoulder. The claimant sought medical treatment for his shoulder from Dr. JB on January 31, 1997. The claimant testified that Dr. JB diagnosed a probable rotator cuff tear and a January 31, 1997, office visit receipt from Dr. JB contains a diagnosis of a rotator cuff injury. The claimant stated that the problems with his shoulder continued to progress after the \_\_\_\_\_, injury in that he continued to lose strength in his shoulder and was no longer able to do overhead work; however, he explained that he did not lose time from work because he was transferred to another job site where he did not have to lift his arms. He stated that on \_\_\_\_\_, he was standing on a ladder and working overhead pulling a conduit which slipped, causing him to injure his left thumb which became caught in a ceiling grid. The claimant testified that he also injured his right shoulder again in the incident; however, he testified at another point that the problems with his right shoulder became progressively worse after the \_\_\_\_\_, injury.

On April 4, 1997, the claimant began treating with Dr. L. Dr. L referred the claimant for an MRI on April 23, 1997, which revealed a "global tear, rotator cuff, with rather marked retraction of the supraspinatus tendon . . . ." Dr. L attributed the claimant's right shoulder injury to the \_\_\_\_\_, incident at work; however, his records also reflect that the claimant denied any previous injury to the right shoulder.

Dr. E became the claimant's treating doctor for his left thumb injury. On June 10, 1997, Dr. E performed surgery on the claimant's left thumb. In a Report of Medical Evaluation (TWCC-69) dated April 3, 1998, Dr. E certified that the claimant had reached MMI as of that date for the left thumb and assigned a 3% IR for the thumb. The claimant disputed Dr. E's certification and Dr. BX was selected by the Texas Workers' Compensation Commission (Commission) to serve as the designated doctor. In a TWCC-69 dated July 2, 1998, Dr. BX certified that the claimant reached MMI on June 24, 1998, the date of his examination of the claimant, with an IR of 3% for the left thumb. The claimant's treating doctor for his right shoulder is Dr. BU. On January 2, 1998, Dr. BU performed surgery on the claimant's right shoulder. Dr. BU certified that the claimant reached MMI on January 5, 1999, and assigned a 20% IR for the right shoulder.

It is at this point that the case becomes somewhat complicated in that the decision was made to add the 3% IR from Dr. E and the 20% IR from Dr. BU for a total of 23% and to pay 69 weeks of impairment income benefits (IIBs) beginning on January 6, 1999, the day after Dr. BU certified MMI. The claimant's attorney testified at the hearing that he and the adjuster handling the claimant's claim agreed to "roll the two injuries into a single injury." Specifically, he testified that he and the adjuster agreed to ignore the \_\_\_\_\_, injury and to cover both the right shoulder and the left thumb under a \_\_\_\_\_, date of injury; that the adjuster agreed to "certify to" a 23% IR which included the 3% IR for the thumb from Dr. E and Dr. BX and the 20% IR for the right shoulder from Dr. BU; that the adjuster "memorialized" the agreement in a Notification Regarding [MMI] and/or [IR] (TWCC-28); and that the carrier proceeded from that point to make IIBs payments on the \_\_\_\_\_, injury only. The February 6, 1999, TWCC-28 states that the carrier has received the reports from Dr. BU and Dr. E, that the claimant has been assigned an IR of 23%, and that the claimant is entitled to 69 weeks of IIBs. In a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) attached to the TWCC-28, the carrier states that it had overpaid temporary income benefits and that it would take a credit from IIBs beginning January 6, 1999.

A copy of a check dated July 7, 2000, was in evidence, which reflects that the carrier purported to pay the first quarter of SIBs to the claimant on that date. The claim number on that check is the number the carrier assigned to the \_\_\_\_\_, date of injury. On a check stub dated August 7, 2000, the carrier purported to pay the second quarter of SIBs to the claimant. That document reflects a date of injury of \_\_\_\_\_, and includes the claim number that the carrier assigned to the \_\_\_\_\_ injury.

Initially, we will consider the carrier's appeal of the hearing officer's determination that the claimant sustained a compensable right shoulder injury on \_\_\_\_\_. The hearing officer did not err in making that determination. The hearing officer is the sole judge of the weight and credibility of the evidence, including the medical evidence. Section 410.165(a); Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1984, no writ). Injury can generally be established by the testimony of the claimant alone, if it is credited by the hearing officer. Texas Workers' Compensation Commission Appeal No. 92069, decided April 1, 1992. It was for the hearing officer, as the trier of fact, to resolve the conflicts and inconsistencies in the evidence and to determine

what facts had been established. Garza v. Commercial Ins. Co., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Sufficient evidence supports the hearing officer's determination that the claimant injured his right shoulder at work on \_\_\_\_\_, and nothing in our review of the record reveals that the injury determination is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. As such, no sound basis exists for us to reverse that determination on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer likewise did not err in determining that the \_\_\_\_\_, compensable injury did not extend to or include a right shoulder injury. The hearing officer noted that she was discounting the medical evidence that tied the right shoulder injury to the \_\_\_\_\_, injury at work because the doctors who provided those causation opinions were not advised of the \_\_\_\_\_ injury or Dr. JB's rotator cuff tear diagnosis on January 31, 1997. Those factors were properly considered by the hearing officer in making her credibility determinations. The hearing officer's determination that the claimant did not sustain his burden of proving that he injured his right shoulder in the \_\_\_\_\_, injury is not so against the great weight of the evidence as to compel its reversal on appeal.

The resolution of the balance of the issues related to the \_\_\_\_\_, injury, namely the MMI date, the IR, and entitlement to SIBs, is largely dependent upon the resolution of the issue of whether the carrier waived the right to dispute the IR for the \_\_\_\_\_, injury. The claimant contends that the carrier waived the right to dispute a 23% IR under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(g) (Rule 130.102(g)) because it paid two quarters of SIBs to the claimant without raising a dispute of the 23% IR. Rule 130.102(g) provides that "[i]f there is no pending dispute regarding the date of [MMI] or [IR] prior to the expiration of the first quarter, the date of [MMI] and the [IR] shall be final and binding." The hearing officer determined that the carrier did not waive the right to dispute the IR in this instance. We find no error in that determination. The claimant contends that the 23% IR is final because the carrier paid two quarters of SIBs based upon that rating and a January 5, 1999, MMI date. The fundamental flaw in this argument is that there is no 23% IR and, as such, the carrier cannot be found to have waived into a rating that does not exist. This situation appears to be covered, by analogy, by referencing Section 408.005(c), Rule 147.9(b)(2), and Advisory 94-06, which was issued by the Commission's Executive Director on July 19, 1994. Section 408.005(c) provides that a settlement or agreement resolving an issue of impairment "must adopt" an IR using the version of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) required in Section 408.124. Rule 147.9(b)(2) interpreted Section 408.005 and provides that a settlement or agreement "must adopt an [IR] established by a doctor. . . ." In Advisory 94-06, the Executive Director specifically identified an agreement to a date of MMI not certified by a doctor or an IR not assessed by a doctor as an example of an agreement that was not made in compliance with the 1989 Act and the Commission's rules and policies, which would be set aside by the Commission and not be binding upon the parties. The same reasoning applies here. The alleged 23% IR is not a rating that was assigned by a doctor for the \_\_\_\_\_, compensable injury. Thus, it was not available to become final and binding under Rule 130.102(g) and the hearing officer did not err in

determining that the carrier did not waive its right to dispute the IR for the \_\_\_\_\_, injury.

Having affirmed the determination that the carrier did not waive into a 23% IR for the \_\_\_\_\_, compensable injury, the hearing officer did not err in determining that the claimant reached MMI on June 24, 1998, with a 3% IR as certified by Dr. BX, the designated doctor. There is virtually no medical evidence contrary to the 3% rating for the left thumb injury and certainly not the great weight of the other medical evidence contrary thereto. As such the hearing officer properly accorded presumptive weight to the designated doctor's report and the June 24, 1998, MMI date and 3% IR. Sections 408.122(c) and 408.125(e). Given that the claimant had a 3% IR for the \_\_\_\_\_, compensable injury, the hearing officer did not err in determining that the claimant is not entitled to SIBs for the alleged third quarter because he did not meet the threshold requirement of having an IR of 15%. It is important to note that the issues of MMI, IR, waiver, and SIBs entitlement for the \_\_\_\_\_, compensable injury were not before the hearing officer or the Appeals Panel and those issues have not been resolved in the dispute resolution process.

The hearing officer's decision and order are affirmed.

---

Elaine M. Chaney  
Appeals Judge

CONCUR:

---

Gary L. Kilgore  
Appeals Judge

---

Robert W. Potts  
Appeals Judge